

Excerpts from “The Future of American Sentencing: A National Roundtable on *Blakely*”

Edited by Robert Weisberg*

THE JURISPRUDENCE OF *BLAKELY*—ROOTS AND IMPLICATIONS

Participants:

Ronald Allen, John Henry Wigmore Professor of Law, Northwestern University.

Albert Alschuler, Julius Kreeger Professor of Law and Criminology, University of Chicago.

Stephanos Bibas, Associate Professor of Law, University of Iowa.

Michael R. Dreeben, Adjunct Professor of Law, Georgetown University Law Center; Deputy Solicitor General in the Office of the Solicitor General, United States Department of Justice.

Jeffrey L. Fisher, Partner, Davis Wright Tremaine, LLP. Mr. Fisher represented the petitioner/defendant in *Blakely v. Washington*. He also is visiting lecturer at the University of Washington School of Law.

Joseph E. Kennedy, Associate Professor of Law, University of North Carolina.

Jonathan Wroblewski, Deputy Director of the Office of Policy and Legislation, Criminal Division, United States Department of Justice and formerly Director of Legislative Affairs; Deputy General Counsel, United States Sentencing Commission.

* Edwin E. Huddleson, Jr. Professor of Law, Stanford University. Major credit for preparing the record of this event goes to David Lieberman, Stanford J.D. '06, Julia Lipez '06, Nolan Reichl '06, and Michael Romano '03. This conference was the launching event of the new Stanford Center for Criminal Justice.

*BLAKELY AND THE STATES: EFFECTS ON STATE LAW AND THE CHANGING ROLES
OF SENTENCING COMMISSIONS*

Participants:

Ronald Allen, John Henry Wigmore Professor of Law, Northwestern University.

Douglas A. Berman, Professor of Law, Moritz College of Law, The Ohio State University.

Steven Chanenson, Assistant Professor of Law, Villanova University.

Michael R. Dreeben, Adjunct Professor of Law, Georgetown University Law Center; Deputy Solicitor General in the Office of the Solicitor General, United States Department of Justice.

Marc L. Miller, Professor of Law and Associate Dean for Faculty and Scholarship, Emory University School of Law.

J. Bradley O'Connell, Staff Attorney, First District Appellate Project (a non-profit organization which administers the appointment of counsel process for direct appeals in California's First District).

Kevin R. Reitz, Professor of Law, University of Colorado; Reporter, the revision of the section on sentencing and corrections of the American Law Institute's Model Penal Code.

Barbara Tombs, Executive Director of the Minnesota Sentencing Guidelines Commission; former Executive Director of the Kansas Sentencing Commission.

Richard B. Walker, Chief Judge of the State of Kansas District Court for the Ninth District; member and former Chair of the Kansas Sentencing Commission.

Ronald F. Wright, Professor of Law, Wake Forest University.

IDEALISTIC REFLECTIONS: THE FUTURE OF SENTENCING REFORM

Participants:

Albert Alschuler, Julius Kreeger Professor of Law and Criminology, University of Chicago.

Douglas A. Berman, Professor of Law, Moritz College of Law, The Ohio State University.

Frank O. Bowman III, M. Dale Palmer Professor of Law, Indiana University Law School.

Honorable Charles R. Breyer, United States District Judge for the Northern District of California.

Michael R. Dreeben, Adjunct Professor of Law, Georgetown University Law Center; Deputy Solicitor General in the Office of the Solicitor General, United States Department of Justice.

Joseph E. Kennedy, Associate Professor of Law, University of North Carolina.

Susan R. Klein, Baker & Botts Professor in Law, University of Texas at Austin.

Marc L. Miller, Professor of Law and Associate Dean for Faculty and Scholarship, Emory University School of Law.

Kevin R. Reitz, Professor of Law, University of Colorado; Reporter, the revision of the section on sentencing and corrections of the American Law Institute's Model Penal Code.

Kate Stith, Lafayette S. Foster Professor of Law, Yale Law School.

Robert Weisberg, Edwin E. Huddleson, Jr. Professor of Law, Stanford University.

David N. Yellen, Max Schmertz Distinguished Professor of Law, Hofstra University.

Excerpts from “The Future of American Sentencing: A National Roundtable on *Blakely*”

INTRODUCTION

The law of sentencing in the United States was transformed on June 24, 2004, when the Supreme Court imported into sentencing law a dramatic new reading of the Sixth Amendment right to a jury trial. Judges, legislators, sentencing commissioners, criminal lawyers, and legal scholars began the vexing task of imagining the implications of *Blakely v. Washington*.¹ In the midst of this national reconsideration of American sentencing, Stanford Law School was fortunate to host an assemblage of some of the most distinguished sentencing experts in the United States for a public conversation on *Blakely*. This “National Roundtable” was held on October 7 and 8, 2004, by happy coincidence the very week that the Supreme Court heard oral argument in *United States v. Booker*² and *United States v. Fanfan*,³ the cases by which the Court had accepted the challenge it imposed upon itself in *Blakely*—to clarify *Blakely*’s effect on the Federal Sentencing Guidelines. The virtually unanimous consensus at the Roundtable—that the Court would extend *Blakely* to the federal system—has now been borne out in the *Booker* decision.

The Roundtable participants, of course, addressed the technical implications of the new Sixth Amendment, including the possible constitutional remedies for Sixth Amendment violations at sentencing, while also projecting the wide variety of possible congressional responses. But the Roundtable also addressed deeper and broader questions arising from these cases—such as the intellectual origins and jurisprudential significance of *Blakely*’s reading of the Sixth Amendment; the effects of *Blakely* on the widely varied and often highly innovative sentencing schemes that have emerged in the states during the last two decades while so much attention has been focused on the federal guidelines; and the more speculative implications of this new doctrine for the general philosophies and goals of modern American sentencing reform. We have excerpted key parts of the proceedings of the Roundtable dealing with these questions, and we are grateful that the *Ohio State Journal of Criminal Law* has opened its pages for us.

¹ 124 S. Ct. 2531 (2004).

² 125 S. Ct. 738 (2005).

³ *Id.*

THE JURISPRUDENCE OF *BLAKELY*—ROOTS AND IMPLICATIONS

In *Blakely*, the Supreme Court extended the rule of *Apprendi v. New Jersey*⁴ and held that the Sixth Amendment right to a jury trial can be violated even by a sentence below what has historically been considered the statutory maximum. Now, under *Blakely*, “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.”⁵ As we ponder the implications for state and federal sentencing schemes, one can pause and ask how we got here. Is a retooling of the line between “crimes” and “sentencing facts” inconsistent with originalist notions and the history of the Sixth Amendment? Was *Blakely* indeed an unforeseeable event, or can we find significant foreshadowings in such cases as *In re Winship*⁶ and *Mullaney v. Wilbur*?⁷ Did these cases demand a “substantive” change in criminal law, or did they invite merely formalistic ones? Will the states and Congress be able to accommodate *Blakely* and *Booker* through formalistic re-drafting of their sentencing guidelines? Or is *Blakely* one last opportunity to deploy constitutional law to determine the constitutional and constitutive requirements of a true criminal law?

Ronald Allen: The precursor to the *Apprendi* problem is *Winship*, *Mullaney*, *Patterson*,⁸ *Sandstrom*,⁹ *Ulster*,¹⁰ *Martin*,¹¹ all those cases. And interestingly, the problem is, I think, similar, if not identical to what it is now, and that is, what’s the constitutional interest in the substantive criminal law? Then the focus was exclusively on proof beyond a reasonable doubt, which has an interesting implication, rather than on that standard coupled with trial by jury. But I think the conceptual problems really were identical. In 1977 I was struggling with *Mullaney*, which I thought had to be wrong, and I wrote this following sentence:

⁴ 530 U.S. 466, 490 (2000) (holding that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”).

⁵ 124 S. Ct. at 2537.

⁶ 397 U.S. 358, 361 (1970) (announcing the “requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt”).

⁷ 421 U.S. 684 (1975) (finding unconstitutional a Maine statute that shifted to the defendant the burden of proving a mens rea lower than malice aforethought).

⁸ *Patterson v. New York*, 432 U.S. 197 (1977) (upholding a New York statute that shifted to the defendant the burden of proving extreme emotional disturbance).

⁹ *Sandstrom v. Montana*, 442 U.S. 510 (1979) (finding unconstitutional lower court jury instructions that relieved Montana of the burden of proving the defendant’s mens rea).

¹⁰ *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979) (upholding New York trial court jury instructions allowing—but not requiring—the jury to assume that the presence of a firearm in an automobile is evidence of its possession by each of the automobile’s occupants).

¹¹ *Martin v. Ohio*, 480 U.S. 228 (1987) (upholding an Ohio statutory scheme in which the defendant had the burden of proving self-defense).

"Of other theories that have been advanced to explain the 'enigmatic decision' in *Wilbur*, only one merits serious attention: If a state specifically deems a fact relevant to a sentence, then the prosecution must prove that fact beyond a reasonable doubt." I then spent the rest of the article explaining why that was wrong. Well, and interestingly, the Supreme Court of the United States cited to those passages in *Patterson v. New York* when it cut back on *Mullaney v. Wilbur*. In any event, while the roots of today's problem lie in these cases in the mid-70s, my interest in those cases turned out to be in their epistemological aspects rather than their implications for the criminal justice process. I have spent most of the last few days examining questions of formal reasoning and the relationship to common sense and so on, so I want to say two things. I think that *Blakely* is wrong, but not because I think the Sentencing Guidelines are a good thing or anything of that sort. Maybe the Sentencing Guidelines are a misshapen, ill-begotten creature that deserves to be put out of its misery. Maybe they're the best thing since sliced bread. So, given all these qualifications, what can I do? I can do two things. Number one, I think I can actually explain how we got from the mid-70s to *Apprendi* and *Blakely* through the Federal Sentencing Guidelines. And the way we got there has some interesting implications for the conceptual issue that I think really dominates that problem. And then secondly, I hope to provide what I call an external stance on some of the questions you'll be discussing, and in particular to remind you of the sort of checkered past that the Court has had in its forays into the substantive criminal law.

First, the ideology: *Mullaney* did, in a sense, exactly what *Blakely* did. It picked and chose a few passages from *Winship*, took them out of context, applied them in a completely different context, examined their logical implications, and more or less went with it, with the result that that would have caused a reworking of a substantial portion of the then-existing substantive criminal law. Interestingly, *Patterson* saw this, and chose not to go down that path. Many of us at the time were urging it not to go down that path by articulating what the constitutional interest in the substantive criminal law is, and by providing the means of a rational ordering of things like proof beyond reasonable doubt and I think, actually, jury trial as well. But the Court instead didn't. Jeffries and Stephan at Virginia were making arguments along these lines. I had made the argument that proportionality is the proper test to apply. If something, in fact, was necessary for the sentence given an Eighth Amendment proportionality requirement, then it had to meet all the panoply of procedural rights. The Stephan-Jeffries argument was that there is this constitutional interest in the structure of the common law form of criminality that ought to be preserved.¹² The Court accepted the argument that there had to be a constraint—that was *Patterson*—but what they did would seem to articulate an elements test, that an element is what the legislature says it is and that's more or less the end of the story. And that's what distinguished, although it's the height of

¹² See John C. Jeffries & Paul B. Stephan, *Defenses, Presumptions, and Burden of Proof in Criminal Law*, 88 YALE L.J. 1325 (1979).

formalism, *Patterson v. New York*. That's what they said to get themselves out of a box. There's a second line that came out of *Winship* that also contributes to the structuring and the creation of the Sentencing Guidelines, and also has an interesting implication today. The second line dealt with the various evidentiary devices that actually in many respects are analogous to affirmative defenses. This is the line that went through *Sandstrom v. Montana* and *Ulster County Court*. Those cases did the same thing. *Sandstrom* took a few passages from pre-existing cases applied in a way that would have again required substantial re-working of aspects of the criminal law. *Ulster*, basically, was a highly analogous case, saw this, and again curtailed it, and said, "No, we're not going to do that." Here again the reason, and the way in which they did it, was basically through formal distinctions. So by the time you get done with this line of cases, what you have is a strong vindication of formality.

The conceptual problem is that sentencing is a continuous variable—from zero to life—that it seems, the Court has said, sheds light on or is triggered by or initiates constitutional interests. Now you have two options. You can treat it as a continuous variable—that's what the Court did in *Mullaney*, in *Sandstrom*, and now in *Blakely*—if you're at any stage in that variable, the constitutional rights are initiated. In all three cases, that's how it was thought of. Or, you can ignore the continuous nature of it, and look for a way not to treat it in that fashion. Then you have two choices. Either you construct a sort of formal argument, a distinction without a difference, to simply curtail it. That's what the Court did in *Patterson* and *Ulster*. Or you can do what the commentators were arguing for back then, which is come up with a substantive argument that explains why there is a limit on this particular continuous variable.

Blakely seems exactly a rerun of this, in a slightly different context and with exactly the same problems. That's also why I think *Blakely* is a mistake. Now return to this point that there are two lines leading out of *Winship*, not one. The second line has to do with all these other evidentiary devices. Now, maybe the Court will de-couple the proof beyond a reasonable doubt requirement from the jury trial requirement. If they don't they have a real problem. There is no question that, all the way back into common law, burdens could be placed on defendants. Here is what Blackstone wrote in 1762: "All [these] circumstances of justification, excuse or alleviation" are rested on the defendant.¹³ It's not peculiar to the law of homicide, but prevails in all of the departments of criminal law. So, if you don't separate those two, which you might, you have a problem. You have an even deeper problem. All three branches of the government, the executive, the legislature, and the judiciary, have their hands all over the inferential process at trial. Inferences, presumptions are examples, comments on the evidence in states that allow it are examples, but more deeply than that, questions of admissibility. If you control what evidence is heard, you can control the outcome. So all over the

¹³ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 201 (Univ. of Chicago Press 1979) (1769).

criminal trial are the hands of the other branches of government: The executive in determining what evidence to offer, the legislature in providing rules of admissibility/exclusion and the like, the judiciary and their choices, discrete choices. So the idea that you can idealize the criminal jury and it's going to decide in this sort of Kantian fashion, proof beyond reasonable doubt, unconstrained by the awful influence of government—that's just a non-starter. Now, how do you cabin that off? Well there's only one way to cabin it off. It's just like I said before, you either have to come up with a formal argument that distinguishes it (formal meaning distinction without a difference), or you have to come up with a substantive theory.

And it turns out there is a substantive theory about that, it's the Eighth Amendment. So, if facts are necessary given what the sentence is, or given the maximum sentence a person's exposed to, then that fact has to be proven beyond reasonable doubt, and I would have said, if asked, jury trial and everything else, as well. But that, working within the constraints of the Eighth Amendment, that means the legislature could eliminate that fact, just as they can today. If they can eliminate that fact, it's very hard to see how a defendant's constitutional interest is compromised by instead requiring proof by preponderance or some lower standard.

Michael Dreeben: The rule that the Court had come up with in *Mullaney*, in an effort to protect the right to proof beyond a reasonable doubt, was a very indeterminate rule. The Court came to perceive that *Mullaney* would wipe out a lot of valuable legislative innovation if it meant that any fact that increased a defendant's exposure to punishment had to be proved beyond a reasonable doubt. And the Court picked up on that theme in *Patterson* when it limited the *Mullaney* rule. *Patterson* pointed out that a broad reading of *Mullaney* might hinder reform of the felony murder rule or statutory rape laws. The Court said, "We don't want to be interfering that much with legislative prerogatives." The result in *Patterson* is a totally formal rule that gives almost no protection to defendants against a legislature bent on circumventing the jury trial right or diluting the proof beyond a reasonable doubt requirement. And for many years that's exactly where the equilibrium fell. A lot of things happened in the world of sentencing between *Patterson* and *Apprendi*, including the advent of the Sentencing Guidelines. How much of that ended up fueling *Apprendi* itself is hard to say. But what is remarkable and ironic about *Apprendi* is that the Court pretty much turned the tables on *Patterson* by adopting a formal rule for the purpose of protecting the jury trial right. And by announcing a formal rule, *Apprendi* achieved what *Mullaney* had failed to do, namely, offering some definable protection to a defendant's jury trial right, without calling into doubt all legislative innovations in sentencing law. Now, *Blakely*, I think, missed an opportunity. The Court could have elected not to extend *Apprendi* to the Washington state system. It could have said, "What Washington has done is to co-opt the discretionary sentencing power, that was

available under *Williams v. New York*,¹⁴ for a judge to do anything he wanted to do, and cabined and guided that discretion, but preserved enough of it so that the fact that the judge could go up above the presumptive guidelines without raising the 'statutory maximum' term." But the Court didn't go down that road.

I will now offer a very simplified critique of *Blakely* that suggests that it's not actually about what it seems to be about. What it seems to be about is limiting hostile legislatures that want to circumvent the "circuit breaker" in our machinery of justice, the jury, by assigning determinations that will affect the defendant's sentence to a judge. That's what *Blakely* is about on the surface. But, I argue that it's not really about that at all. First of all, it's not really about protecting the jury, because, if the legislature wants to, it can set the sentence for kidnapping from zero to ten years, and the judge can then make any findings he wants within that range, without submitting the issues to a jury. If that system is consistent with *Blakely*, and *Blakely* is about protecting the jury trial, then it's a very strange rule, because it allows legislatures to get out of jury trials altogether on sentencing factors just by eliminating guidance to the sentencing judge. The other possibility is that *Blakely* is aimed at legislatures. On that theory, *Blakely* seeks to have legislatures respect the jury trial right by providing a meaningful check on attempts to limit the sentencing judge's discretion without using the jury as a factfinder. But *Blakely* can't possibly be about that either because, given its formal nature, and given cases like *Harris v. United States*¹⁵ and *Patterson v. New York*, the first upholding mandatory minimums sentences, the second upholding affirmative defenses, any legislature that's bent on evading the jury trial guarantee has a plethora of options open to it.

So, if *Blakely* is really not about what it says it's about on the surface, what is it about? I would submit that *Blakely*'s formalism is really about Justice Scalia's view of constitutional interpretation. Justice Scalia prefers tests that are grounded in constitutional text, bright-line rules, history and other ways of deciding a case that do not require judges to do much subjective thinking about the way the Constitution works. He announced that pretty clearly in *Blakely* itself, praising the decision as announcing a bright-line rule.

But why hold Justice Scalia responsible, when he is just one of five votes? I give him extra credit because of history. He originated the rule that became *Blakely* virtually out of nothing, in his separate opinion in *Almendarez-Torrez*.¹⁶ Even more significantly, Justice Scalia defected from his other four colleagues in *Harris v. United States*, and said that *Apprendi* does not apply to mandatory

¹⁴ 337 U.S. 241 (1949) (holding that the Due Process Clause did not prohibit the trial court from considering a probation report prepared on defendant even though defendant had no opportunity to disprove aspects of the report).

¹⁵ 536 U.S. 545 (2002) (holding that *Apprendi* does not require jury to find fact that increases mandatory minimum sentence).

¹⁶ *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (holding that statute may allow for an increase in the maximum punishment based on a judicial finding of a prior conviction).

minimums, thereby opening up one of the most obvious ways of evading *Blakely*. That suggests that the Court's *Blakely* jurisprudence, considered as a whole, is not as much about what happens to defendants in actual criminal cases, as it is about establishing a particular style of constitutional interpretation.

Rory Little: What is the underlying theory of constitutional interpretation in *Blakely*? How do you interpret the text of the Constitution in order to reach certain results when the language doesn't quite speak to it? I had the ignominious distinction of filing a petition for re-hearing in the *Blakely* case, in which I argued that history doesn't answer this question. I think Justice Scalia has actually conceded as much, although he would never say so in print. Justice Scalia's position is that of a constitutional originalist, but he does not stick to all the evidence that might be looked to in that inquiry, at least in the *Blakely* context, and he's much more interested in what the common law might say in addition to his own evolving notions.

First, has the Supreme Court ruled that the legislature may not give precise directions (not advice, but binding directions) to criminal sentencing judges about how to sentence within legislative statutory ranges? The answer is no, not entirely. The *Blakely* Court majority stressed that its constitutional ruling was entirely procedural, not substantive. So long as it is a jury and not a judge that finds the facts, legislatures may continue to give sentencing judges precise directions as to how these facts must be weighed, or weighted, in the sentencing balance. So I don't believe the Court intends to re-define, or has re-defined, what an element is, for constitutional purposes. They've used the analogy of element to get to the constitutional process implications of their analysis, but I don't believe they're re-defining elements. The consequences of an element are, of course, three: fair advance notice, proof beyond reasonable doubt, and found by a jury. But people need to remember the *Winship* Court actually never used the word "element." It said every fact necessary to constitute a crime. *Blakely* and *Apprendi* still leave the legislature full authority to define crimes and authorize statutory maximums within which judges may sentence, and that kidnapping can remain kidnapping in Washington State, even if Washington State gets rid of the aggravating factor of deliberate cruelty as a binding precise direction. Furthermore, if Washington State does what Kansas did and allows juries to find that fact, judges can still be given the discretion over what to do with the fact. It doesn't require the jury sentence; it only requires that they find facts. *Apprendi* is very different in this sense, in that the New Jersey statutory structure clearly did define a new crime, when it said, "Possession of a gun, capped at ten years, can become possession of a gun with racial bias, capped at twenty years." That is a very easily distinguished set of legislative decisions. For example, *Blakely* would not be acquitted of kidnapping, even if you gave the jury the job of finding facts on deliberate cruelty. If the jury were to find that he committed the elements of kidnapping, but without deliberate cruelty, he would not be acquitted. An element is a basic structural unit of a crime: it is not an element to find an aggravating factor which may or may not aggravate a

sentence. And it seems to me *Blakely* is purely a Sixth Amendment jury trial decision. This is why Justice Scalia stresses for the majority at the end of *Blakely* that the decision reflects the need to give intelligible content to the right of the jury trial.

I'll suggest there are three camps of constitutional interpretive theorists over the course of the last forty-five, fifty years, which is when criminal procedure actually developed as a constitutional area in this country. First, you have constitutional originalists; these are familiar to us today (though they weren't so familiar until Justice Scalia got appointed), but these are believers in history. That the Framers in 1789 were governed, if you will, by a common law understanding when they wrote the text, and so the text, when it isn't plain, must be interpreted in light of their common law understandings. It's undeniable that in *Apprendi* the Court was wrong about its history. In *Apprendi*, the Court spent six pages saying the Framers were not familiar with indeterminate sentencing. They were familiar with fixed-term sentencing. There's some quotation of Blackstone, who was discussing English common law, and some state cases, but if you look at what they did, the Framers, the same people who wrote the Sixth Amendment, at the same time they were writing it (when they wrote the first federal crime bill), they wrote provisions that were indeterminate sentencing ranges. They wrote a dozen crimes, for which they said the penalty shall be imprisonment not to exceed three years, seven years, ten years. They were progressive sentencing reformers. They were leaving the fixed-term era and leading, if you will, into indeterminate sentencing. Whether you believe that at the same time they wrote indeterminate sentencing ranges, they would have believed that a legislative direction on how to sentence within the range would violate the right to jury trial, which they wrote at the exact same time—there's no evidence to support any particular result there. But to ignore that fact in *Apprendi*, and then to simply say in *Blakely*, "We considered these authorities and we don't need to repeat them here," is mistaken, particularly when the issue in *Blakely* was within-range sentencing, which they distinguished after they gave their wrong view of history in *Apprendi*. They immediately said, "Of course, we're not dealing here with within-range sentences." That's why every circuit decided to say that, after *Apprendi* and after *Ring*,¹⁷ that within-range sentencing guidelines were fine. So any textual interpretation in history doesn't do it.

You have two other ways of interpreting the Constitution in regard to criminal law. One is represented by *Miranda*,¹⁸ and I use that because of the extreme nature of its theory. This is a theory that allows the Constitution to be interpreted broadly, and allows the Court to structure rules to protect constitutional rights.

¹⁷ *Ring v. Arizona*, 536 U.S. 584 (2002) (finding unconstitutional an Arizona statutory scheme granting a judge the ability to impose the death sentence upon a defendant only after finding facts additional to those found by the jury).

¹⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that a suspect must receive certain warnings prior to custodial interrogation in order to protect Fifth Amendment rights).

And of course Justice Scalia has been a huge critic of *Miranda*. He doesn't see himself in that camp. He says there's no constitutional support for the *Miranda* result in his *Dickerson*¹⁹ dissent.

The third way of interpreting constitutional language might be called, "Evolving Constitutional Standards." This is represented most dramatically by the Eighth Amendment jurisprudence of the Supreme Court. The idea that Justice Brennan would have subscribed to, that the text is not immutable, and that what the Framers thought is not the steady-state nature of the game, that it may evolve over time to address our evolving notions.

And I suggest that the triumphant architect in the *Blakely-Apprendi* line of cases is not Justice Scalia; it's Justice Stevens. Justice Stevens in 1984 wrote a dissenting opinion in a case called *Spaziano v. Florida*,²⁰ in which he wrote an opinion on the jury's role in sentencing, and the need for the jury to be the sentencer, to have a morally acceptable system of sentencing. His remarks were limited to the capital context, but the similarities between what he said about the role of the jury and what Justice Scalia says at the end of *Blakely* are uncanny. They're eerily similar in the importance of the role, and the importance of that role to structural beliefs that we have culturally in this society. The genius of *Blakely* is that Justice Stevens found a way to get the constitutional originalists to come with him in this enterprise. The genius of *Blakely* is that Justice Stevens quietly allowed his idea to percolate, and yet, if you will, allowed the constitutional history to be written in a way so that Justice Scalia and late, but not too late, Justice Thomas [would] come to the table and join him. And remember that Justice Stevens's dissent was assigned to him by the senior Justice on the Supreme Court at that time in 1984, Justice Brennan. So I actually think Justice Brennan is smiling as he watches this conference.

Albert Alschuler: Well, here's a thought experiment. What if the issue in *Blakely* had originated thirty years ago in a small western state? Imagine that in the early 1970s a new designer drug, Wham-Smack, appeared on the scene. Most states responded by punishing the possession of this drug in the same way they punished other crimes, by giving broad sentencing discretion to both judges and parole boards. The state of Montoming, however, tried something new. The Montoming statute declared the possession of five or more grams of Wham-Smack a felony punishable by no more than twenty years. That was like all the other states. But then, the Montoming statute added some further provisions. If the offender possessed only five grams, his sentence would be five years. If the judge found, by a preponderance of the evidence, that the offender had possessed ten additional grams at any time within six months of his crime, the sentence would be raised to ten years. Moreover, if the judge found that the offender's supplier had twenty

¹⁹ *Dickerson v. United States*, 530 U.S. 428 (2000) (reaffirming the *Miranda* decision).

²⁰ 468 U.S. 447 (1984) (holding that a death sentence imposed by trial judge following a jury recommendation of life imprisonment did not violate the Constitution).

grams of Wham-Smack in his hat, the offender's sentence would become fifteen years. Sam Wham, who was sentenced to fifteen years under the Montoming statute, argued before the Supreme Court that the state's sentencing procedures were unconstitutional. He claimed that Montoming was punishing him for a crime other than the one for which he had been convicted. The state hadn't given him a jury trial on the additional charges, and had not found him guilty of those charges beyond a reasonable doubt. The Montoming prosecutor insisted that Sam was being punished only for possessing five grams of Wham-Smack. His fifteen-year sentence did not exceed the twenty-year maximum the legislature had authorized for this crime. The fact that Sam possessed ten grams six months ago, and his supplier had twenty grams in his hat, were sentencing factors, not elements of other uncharged crimes. On June 24, 1974, the Supreme Court ruled in Sam's favor, five to four.

Obviously, *Wham v. Montoming* would have made only a tiny blip in the radar screen compared to the one *Blakely v. Washington* made this year. Whatever criticism this decision generated would have focused more on the criticism of *Blakely* on Sixth Amendment doctrine, and less on the decision's systemic effects. No dissent could have said in this case what Justice O'Connor said this year about *Blakely*: "What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy." A dissenting judge could not have said to a judicial conference that *Wham v. Montoming* was a number ten earthquake. The question is, how much, if at all, should the circumstances and dark predictions matter in deciding a case like *Blakely*? Do the predicted consequences bear at all on constitutional doctrine? Why do they matter, if they do? Could a Court that would have ruled in Sam's favor thirty years ago properly rule against him today? Have the developments of the past thirty years changed the answer to the question, whether the Constitution entitles an offender to trial by jury on facts that can double and triple his sentence?

Let me initially explain the lunatic proposition that changed circumstances and consequences never matter in constitutional adjudication. The easiest case for taking them into account is one in which the consequences reveal a defect in someone's analysis or in his works. For example, if *Blakely* truly applies only to maximum sentences, Congress can resolve all of the Federal Guidelines' constitutional difficulties by enacting Frank Bowman's proposal to increase the top of every Guidelines range to the formal statutory maximum while otherwise leaving the Guidelines intact. The fact that *Blakely*'s requirements would be satisfied by this pointless and perverse legislation reveals a defect of the decision. For the decision to make any sense it must apply to minimum as well as maximum sentences.

Justice O'Connor's dissent offers a different reason for attending to the consequences: The life of the law has not been logic, but experience, and Justice O'Connor maintains that the sentencing reform movement of the past two decades has been a smashing success. *Blakely* will undo this success story and plunge sentencing back into disarray, disparity and darkness. Well, surely this grave

threat bears on the proper result of the case. But suppose that Justice Scalia and the Supreme Court majority had made just the opposite argument. The majority opinion announced that reformers had exaggerated the problem, sentencing disparity. They had examined only the sentences judges imposed, not the sentences offenders served. The whole problem was a bogey. Moreover, the post-Guidelines studies that purport to show reductions in racial disparity are flawed. Some guidelines greatly increase disparity, restricting the discretion of judges while ignoring the discretion of prosecutors, and have proven not only incoherent, but harmful. All in all, the Guidelines had flopped. Well, I hope you would be appalled by the thought of that majority opinion, and not because the majority would have been wrong in its criticisms of the current Sentencing Guidelines. An overall evaluation of the merits of the Guidelines was not the issue before the Court, and indeed had little to do with the issue before the Court. Congress and the Washington legislature had made their judgments about the Guidelines and except insofar as these legislative bodies had failed to respect the right to jury trial, their judgments were entitled to respect. Discussing the demerits of sentencing guidelines in *Blakely* would have been like discussing which candidate would make the better President in *Bush v. Gore*.²¹ Yeah! I mean, look how the decision might affect who's going to be President. Those are real consequences, but when we think that the Court might have been thinking about that, we think the Justices have departed from their responsibilities and some consequences are not the Court's concern.

Maybe the presumption of constitutionality entitles Justice O'Connor to praise the Guidelines while Justice Scalia is forbidden to trash them. But something seems troublesome about a doctrine that allows one group of judges to extol legislation while another group may criticize only the points that it believes makes that legislation unconstitutional. Maybe going beyond the alleged constitutional defects of the legislation should be as much out of bounds for one side of the constitutional dispute as the other.

Well, changed consequences also might matter for another reason. Remedying the constitutional violation now would be more difficult than it would have been thirty years ago when only one imaginary state got it wrong. Much of America has become dependent on Montominy-style sentencing, and dependent in a distinctive way. When a state court declares a statute prohibiting flag burning or same-sex marriage unconstitutional, the state simply has one less statute. But every state needs a sentencing system, and when an old one is declared unconstitutional, a new one must replace it. The courts may not be able to devise an effective remedy on their own.

We know the Congress of the United States had enacted mandatory minimum sentences, rejected efforts to restrict the crack/powder disparity, multiplied the number of sprawling federal crimes, multiplied the number of capital crimes, and

²¹ 531 U.S. 98 (2000).

given us AEDPA,²² the Sentencing Guidelines and the PROTECT Act.²³ The list of congressional disasters in the area of criminal justice could continue *ad nauseam*, if not *ad infinitum*. The Congress has postured and strutted and rubber-stamped the Justice Department without reflection and without a backward glance at the ruined lives in its wake. I've written that Congress may well see *Blakely* as a dare, and an opportunity, to push voters' anti-crime hot buttons, to engage in a urinating contest with the Supreme Court, and to make federal sentences even more monstrous than they already are. I think the best guess, in fact, is that Congress will. Could a rational person favor a judicial ruling that he believes will cause more harm than good? That idea appears unthinkable to most lawyers, judges and academics. They leap to the bottom line. They evaluate *Blakely* by analyzing what Congress might do in response to this decision, which responses would make things better and which worse, and which responses are most likely. When, even at the time of the *Blakely* decision, Congress obviously was likely to respond by making things worse, why did the Supreme Court decide the case as it did? What could the Court have been thinking?

Well, you'll hear all kinds of theories about Justice Scalia and the PROTECT Act, but perhaps five of the Justices were thinking something terribly old-fashioned: "That's not our job." As I wrote in a recent paper, the answer to the question, "Does the Constitution entitle defendants to have the facts that make them eligible for increased sentences determined by juries beyond a reasonable doubt," cannot be "Yes," if wise leaders in Congress are likely to respond by approving guided discretionary sentencing or the submission of some sentencing issues to juries and "No," if those yahoos are likely to enact new mandatory minimum sentences. The alarmed response of lawyers and judges to *Blakely* may reflect their lack of confidence in both Congress and American democracy, and this lack of confidence may well be justified. Perhaps we are witnessing the democratic excesses the Framers of the Constitution feared. The television set, the sound byte, and hard cash may have made the legislative deliberation about the public good a wistful dream, and who else is left to do it but the judges? Well, when lawyers, judges and academics begin to think that way, role differentiation and the separation of powers collapse and the measure of every judicial decision becomes how it will affect the entire world for good or ill. But if that's the job of the Supreme Court, I doubt that they will save us. Maybe they should do what Article III instructs them to do, and let the chips fall where they may.

Jonathan Wroblewski: Let me talk about administrative law. Justice Breyer and Justice Kennedy, at the argument in *Booker*, asked a number of questions about

²² Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered chapters of U.S.C. including 8, 18, 21, 22, 28, and 42).

²³ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (codified as amended in scattered chapters of U.S.C. including 18, 28, and 42).

indeterminate sentencing, parole and parole boards, parole commissions, and parole guidelines. What struck me then and over the next several days is that all of these attributes of sentencing and corrections law are part of a continuous and very long, progressive movement that has coincided in large part with the development of administrative law—itself a progressive movement. It started in sentencing and corrections with Benjamin Franklin and the Quakers, with the idea of the penitentiary as a place to do penitence, which led to the development of indeterminate sentencing. It developed further—along with the creation of the administrative state—with the advent of parole boards to bring expertise to sentencing and corrections decisionmaking. Parole guidelines came when the administrative state moved to administrative lawmaking. And it has continued with the advent of sentencing commissions and sentencing guidelines. And it is that progressive movement which is at stake now.

Why should it matter in terms of procedural protections whether an administrative agency creates a rule triggering a particular punishment or whether the Congress does? It matters because the values underlying the administrative state—of bringing expertise and the advancement of human knowledge to bear on public administration—have long been associated with different procedures. If, on the other hand, sentencing factors are to be treated as elements in every way, then there is a very serious question whether a sentencing commission can promulgate such guidelines. If they can't, I think that's a shame, because if sentencing commissions go out of business or are less directly involved in the promulgation of sentencing rules I think outcomes will be driven even more by politics and will suffer. That's not to say that I believe the United States Sentencing Commission embodies the ideals of the administrative agency. But I do think it would be a shame if because of *Booker* and *Fanfan*, the role of sentencing commissions is diminished.

I believe that the ultimate result will be based on two things. One is the political branch imperative to bring about certainty and severity and keep judicial discretion limited. The second thing that I think will help determine post-*Booker/Fanfan* sentencing policy is the Federal Criminal Code. The Federal Criminal Code is a hodgepodge of statutes, which frankly needs some type of comprehensive reform if it is to properly identify aggravating factors that are going to bring about that certainty and severity, not to mention proportionality, that Congress will require. For example, in most state statutory schemes, stealing is divided up between stealing a little, stealing a lot, and stealing a real lot. Unfortunately, much of the Federal Criminal Code isn't written that way. So the statutes that are used to prosecute most people that steal things in the federal system, the mail fraud and bank fraud statutes, just say if you defraud someone by use of the mail or through a federally insured bank, you are subject to zero to twenty years in prison. There's no differentiation in the code. Ultimately, the state of the Federal Code means that there will need to be either comprehensive reform or some type of guidelines-like overlay to insure that all cases are not treated alike and that aggravating and mitigating factors are properly accounted for.

Joseph Kennedy: First, an essential context for understanding the *Blakely* decision is the state of legislative politics on crime over the last two decades. The last two decades have seen a legislative process on crime that has been characterized by demagoguery, by moral panics, by hastily-drawn legislation passed in response to high-profile crimes, and by the use of crime as a weapon in an on-going culture war. And that was on our good days. The bottom line of this dysfunctional period of legislative policy-making in the area of crime is two million people behind bars. It is a staggering fact, and it is the elephant in the room. The key to understanding *Blakely* is seeing the formalism in the opinion as a means of enforcing legislative discipline in areas where the legislative process has grown dysfunctional. *Apprendi* and ultimately *Blakely* are best understood as an alliance between liberal and conservative judges to discipline the legislative process on crime without directly attacking the proportionality of the punishment imposed, an attack that Scalia and Thomas would never join. Nancy King and Susan Klein touched on this line of thinking in their *Essential Elements* article²⁴ when they compared *Apprendi* to clear statement rules. In the wake of *Blakely* I would take this line of thinking even further. The main idea behind clear statement rules is that you force the legislature to legislate in a way that is transparent in order to foster a more deliberate democratic process. You force the legislature to say what it means clearly. That makes it more likely that the legislature will really mean what it says. In our context, that means the legislature would be less likely to have simply passed a bill that responded to the crime of the month. Think of this in terms of transparency. You know where the legislature stands when it passes a mandatory minimum or three-strikes law because the law operates simply. Guideline sentencing in contrast is opaque because guidelines sentences are so conditional on so many different variables that it is hard to understand what the legislature is really saying. I think *Blakely* is best understood then as a mandate for a legislative process in the area of crime that does not delegate decisions to formulas that are politically invisible. Because guideline sentencing is opaque, it undermines political accountability because it is hard to know in a clear way what the legislature is actually saying. Legislators are not, therefore, as accountable to the electorate and have less incentive to be deliberate. Along these lines, Kennedy talks in the opinion about interbranch dialogue, but it is a conversation that the public cannot follow, and it has increasingly become a monologue in the federal arena. With the monitoring provisions of the PROTECT Act you have Congress sticking its finger in the courts' face saying, in effect, "I am going to be watching you." *Blakely*, then, may help check populist punitiveness not by pitting the judiciary against the legislature in a head to head proportionality review—a move that the court has rejected in the past—but by forcing the legislature into a more transparent process of lawmaking that may lead them to pause and reflect a bit more when legislating a sentencing scheme.

²⁴ Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467 (2001) (cited by Justice Kennedy in *Harris*, 536 U.S. at 561).

Nancy King: I agree with Michael and disagree with Ron about the formality of the basis for these opinions in *Apprendi* and *Blakely*. I believe that this is the formal retreat from the fuzzy, or should I say furry, test of Justices O'Connor and Breyer's wag-the-tail thing. I think just as in *Dixon*,²⁵ cutting back on *Grady*,²⁶—remember that one?—and *Hudson*,²⁷ cutting back on *Halper*.²⁸ In these cases, the Court is policing the line between what's a crime and what is not, where the Bill of Rights kicks in and where it doesn't, and it is giving it a lot of leeway with this formal sense that can be evaded to the legislatures to define them as they please. Only in the most extreme circumstances will we ever encounter such a substantive test to limit. And I think this is all part of the same formal effort to limit the legislature, but not very much. Second, maybe the action isn't in the federal system after all. They talk about the Federal Guidelines, but the clear statement rule and the ability of the formal rule to do any work at all might actually be in the states. Unlike in the federal system, the states have the constraint of cost, and so when they look—as I've been sitting on the Tennessee *Blakely* Commission that is working on revising the state sentencing law to respond to *Blakely*—and when they look at the cost of lifting the presumption and evading, right, versus the cost of perhaps eliminating some of these enhancements altogether, it's not clear which costs more, for the state taxpayer and for the criminal justice system. Do we want more prisons or can we keep the lowering effect of the guidelines that we had by perhaps eliminating some of these aggravating factors and sticking with the criminal code that we had to begin with? So the clear statement, the process of going through and picking and choosing among costs, disparity versus certainty and so forth, might actually shift in a different direction in states where the fiscal restraint is not moving it in that direction in Congress. But, frankly, I don't think it matters at all to Scalia. He would be happy with mandatory sentences that don't allow the judges any discretion. I don't believe it's a war between judicial power and legislative power for him and Justice Thomas. I think instead it's a formal division that the states can work around. The states are not interested in just having high sentences. They want cheap, efficient rules that keep them in office. And those rules may not be the sky-is-falling-projections that people are voicing for Congress.

Stephanos Bibas: Back in the *Williams* era, it made sense to have a judge/jury allocation of authority, when sentencing was a prospective enterprise of

²⁵ *United States v. Dixon*, 509 U.S. 688 (1993) (overruling *Grady v. Corbin*, 495 U.S. 508 (1990), and rejecting the "same conduct" test for double jeopardy).

²⁶ *Grady v. Corbin*, 495 U.S. 508 (1990) (creating a "same conduct" test for double jeopardy).

²⁷ *Hudson v. United States*, 522 U.S. 93 (1997) (disavowing the analysis of *United States v. Halper*, 490 U.S. 435 (1989), and authorizing substantial deference to a legislative designation of a sanction as "civil" in the context of a double jeopardy challenge).

²⁸ *United States v. Halper*, 490 U.S. 435 (1989) (determining whether a sanction denominated "civil" constitutes "punishment" for double jeopardy purposes by the sanction's disproportionality to the harm for which it was imposed).

therapeutic assessment, as many commentators have already noted. But now that sentencing seems to be primarily a retrospective assignment of blame, the whole reason for having a second sentencing proceeding that is so trial-like, and yet is not a trial, is really being called into question. My hope is that out of all of this, we will finally get some real attention to the substantive values that we're serving here. Are the sentencing procedures serving retribution and deterrence? Or back to the transparency point that Joe Kennedy made, are these sentencing procedures getting in the way of the substantive, moral, educative value of the law? If they're too mathematical, if they're too obscure for the public or victims to understand, is there more we can do for transparency to serve those substantive goals? Is it a good thing to bifurcate? Are we getting in the way of giving the victims a substantive role in the process and serving victim values?

I think *Apprendi* and *Blakely* asked the right questions. I think it's good to be focusing on that set of issues. I just wish that if the Court were focused on that, that they had answered them in a different way. I think if you really care about protecting the substance of the crimes, it doesn't fit as neatly in a procedural provision, like the Fifth or Sixth Amendment, as it does, as Ron Allen said, in the Eighth Amendment. The Eighth Amendment's clauses on cruel and unusual punishments and excessive fines seem like more natural ways to approach the linkage between crime and punishment, which is really what we're talking about here. On their very faces, those clauses suggest some kind of proportional linkage. And also, an Eighth Amendment approach would regulate statutory and guideline penalties equally, and maybe not encourage subversion in the same way, assuming that I don't get nailed by Al Alschuler for bringing consequences into this discussion. The question here shouldn't be whether a fact increases the maximum penalty, but whether the maximum sentence for a crime would be cruelly disproportional to the elements that have been proved at trial. In that world, unlike the *Blakely* world, juries would, in a meaningful sense, actually authorize a particular punishment or stigma, instead of the legal fiction that Justice Scalia is relying on.

Jeffrey Fisher: I think that I was able to win the *Blakely* case because I gave the Court a clear test. If you accept that there is something wrong with the statute that was at issue in *Apprendi*—or at least with an even more aggressive, hypothetical statute that would create a single crime of homicide and then let a judge find the *mens rea* that determines whether the defendant is punished for manslaughter or murder, or something in between—then I think it is very hard to come up with a rule that would prohibit that abuse but allow sentencing laws like Washington's to stand. Neither the state of Washington nor the United States really gave the Court much of a proposal here, and the best the dissent could come up with on its own was “too much,” or “tail wagging the dog” test. I think the *Apprendi* majority rightly saw that as just too malleable. I really do believe in the rule of *Apprendi* and of *Blakely*. I realize that it is quite formalistic, and it is not particularly grounded in pragmatism. But I think formalism in this context is okay.

I think that separation of powers, not so much a concern about proportionate or just punishment, is driving *Apprendi* and *Blakely*. I think both wings of the majority—represented by Justices Scalia and Stevens—are content, constitutionally speaking, to leave it to the legislature to come up with whatever system they want, and if they want to give judges complete discretion within a broad range, that's okay. These Justices really believe in the political process. They take a very long view of the Constitution, and they trust that if the public thinks overly broad discretion is unfair then legislatures will give the appropriate procedural protection to "sentencing factors" meant to separate exceptional from ordinary offenders.

Perhaps I'm young and a little naïve, but I'm willing to take the same bet. Kansas already went this route, and it looks like other states such as Washington will go this route. Even if we have an immediate reaction from Congress that we don't like, I still contend that, in the long-term, laying bare the choices for sentencing before democratic bodies is a good thing. To those people—and there are many—who say, "I disagree with *Blakely* because I think a horrible legislative response is going to come," I hope you notice that you share common ground with *Blakely's* supporters: both groups agree that Congress should not react with longer standard sentences, enhanced mandatory minimums, or a return to unbridled discretion at sentencing. Thus, I hope these *Blakely* detractors also will go to Congress and tell them that such legislation would be horrible. If nearly everyone agrees about what Congress should not do, and if we all make ourselves heard, it might just make a difference. And this, I think, is the point of *Blakely*.

BLAKELY AND THE STATES: EFFECTS ON STATE LAW AND THE CHANGING ROLES OF SENTENCING COMMISSIONS

Most of the public furor surrounding *Blakely* concerns the Federal Sentencing Guidelines; but of course the case itself concerns state law, and special focus on state implications and lessons is vital. How precisely have some states—e.g., California, Kansas, Minnesota, Pennsylvania and North Carolina—developed their state schemes in ways that might have "pre-accommodated" *Blakely*, and how might some now have to be changed? In this regard, what difference does it make that the legislature rather than an agency sets the sentencing sub-rules? Do the states offer lessons in how well-structured commission schemes can optimally insulate criminal justice from the risks of political demagoguery inherent in legislative politics? Do some state schemes continue to offer models to admonish us of the failed aspirations of the federal scheme? To what degree must or will state legislatures tweak their modern (somewhat) determinate sentencing rules to stay safely within *Blakely*? Are the states more willing to accept the consequences of *Blakely* for their sentencing schemes? Is this because state sentencing reform has worked better than federal sentencing reform, so that states are more able to deal with change?

Barbara Tombs: I've been the Minnesota Sentencing Commission director just a year. But this is *déjà vu* for me. I went through this once in Kansas when we had the *Apprendi* and *Gould*²⁹ case. So when we faced this in Minnesota, I had a little bit of background and a calmer approach maybe than a lot of states did. Minnesota is a presumptive-determinate guidelines system. It has administrative guidelines, much like the U.S. Sentencing Commission in that manner. But the biggest problem we faced initially was trying to educate people in our state that our system is different from the Federal Guidelines because so much of what was released around the decision with *Blakely* focused on the Federal Guidelines. In Minnesota we basically looked at our sentencing system and decided two things. First, what was the underlying sentencing philosophy for the state? Because that guided us in how we approached the response to *Blakely*. What was the purpose of sending people to prison? And ours was focused on incarcerations being the least amount possible, to allow only incarceration for serious offenses. So we have sort of a modified just deserts system. We use a lot of alternatives up front before we put somebody in prison. But when we put them in prison, we put them there because we are punishing them. And as I'm looking at our sentencing system, the aggravated departures appeared to be unconstitutional in the manner in which they were applied. I've heard several references to the fact that the *Blakely* decision ruled the Washington guidelines unconstitutional. That's incorrect. It did not say they were unconstitutional. It says the way they apply the departures is unconstitutional, and the departures themselves are not unconstitutional. So in looking at that, we decided that our state was constitutional. But in our sentencing system we had to modify the way in which we did our aggravated departures.

We took from background in Kansas, the *State v. Carr*³⁰ case, which ruled that dispositional departures [that is, sentences imposing a prison term rather than a term of probation or parole] were not applicable to the *Apprendi* decision. And in Minnesota we decided that would probably not carry in our state. And so we approached it with *Blakely* affecting both dispositional and durational departures. I hope I'm wrong in that. But with the judges set in our commission and the discussions we've had with people, we felt that dispositional departures would probably be affected.

We also went to our statutes. We had several statutory enhancement statutes. They had nothing to do with departures, but they were statutes in which a sentence could be enhanced by a finding of the court, such as predatory sex offenders, dangerous and violent offenders, that type of thing. The court had to find something in addition to the prior criminal history. That was an easy fix for us, because we just basically changed the words from court to juries and resolved that. We also have a consecutive sentencing issue. Not the consecutive sentencing in

²⁹ *State v. Gould*, 23 P.3d 801 (Kan. 2001) (holding aspects of the Kansas sentencing scheme, which authorized judge to impose longer prison sentence upon certain judicial findings unconstitutional under *Apprendi*).

³⁰ 53 P.3d 843 (Kan. 2002).

and of itself, that's not affected by *Blakely*. But we have a problem in the fact that certain consecutive sentencing provisions say a prior "person felony." Well, there's nowhere in our statutes where we define "person felony." And so the court has been making that determination, whether a certain offense qualifies as a person felony or not. The Commission is going back and looking at all of our offenses and ranking them as either eligible or ineligible for consecutive sentencing, and then the judge just chooses from that list. And then he doesn't have to make a finding, again, addressing the *Blakely* issue. And mandatory minimums, although we believe they are not affected by the *Blakely* decision, we have one mandatory minimum, which has to do with the possession of a dangerous weapon. And what happens when the weapons part of the element of the offense is not an issue at a robbery, but where we have a gun present during a drug deal, which is not an element of the offense, but it triggers that mandatory minimum. So for those offenses they're going to have to do the bifurcated sentencing and deal with that in a different way. Whereas, as far as the specific statutory enhancements I mentioned earlier, we are requesting that the court go with the bifurcated system because we don't have that many of them. We have about forty to sixty a year. They're very serious offenses and just for the issue of public safety and the issue of possible appeals, we are recommending the court goes with the bifurcated system on that. There are several things that we're not sure of that we have in the background. But we know that they're possible *Blakely* issues but we have not recommended specific action on these at this time. And they have to do with the custody status points, how you figure criminal history.

Richard Walker: Well, it's been a long, strange journey from Kansas being a garden-variety indeterminate sentencing state about twenty years ago, to the kind of state that drives Justice Scalia orgasmic in his opinions. And I wish I could say that there has been a straight line of progress, something was incredibly logical and inevitable and legally majestic about it. But it's been just a series of happenstance occurrences which have been coupled with a willingness of Kansas to invest big time in the commission process and on the part of the legislators to invest themselves in it as voting members—moderate folks who were willing to look to larger concepts than just their own parochial interests. And great staff work. I mean, we really have a person here who, from Pennsylvania to Kansas to Minnesota, has taken the principles of structured sentencing and presumptive sentencing and made them work in ways that work in the hallways of the legislature and with the professionals.

Well, Kansas, in 1989, was a mess. We were in prison over-crowding orders, we had an indeterminate sentencing system in which it was not uncommon for somebody to have a five-to-life sentence, which didn't mean five, didn't mean life, and nobody knew what it meant. Could have meant two and a half years in prison, could have meant twenty years in prison. There was the perception that between urban and rural areas there were disparities in sentencing, as between folks who were in the racial majority and racial minorities, that they weren't being treated

equally between the Kansas borders. And just that the system was broken and nobody knew what it meant in Kansas. And so the Sentencing Commission was commissioned to study this. We did a study which created all kinds of havoc, showing that in fact, there was built-in institutional discrimination in the system, simply because people who had good jobs and who had family support were being treated differently than folks who didn't. It was really a messy situation. And nobody knew how many prisons were going to be needed.

But a lot of it had to do with just basic honesty in how the system worked. And it was perceived not to be working. The Sentencing Commission studied this and came up with the sentencing grid which we now have, based upon a drug grid and a non-drug grid. We went from five classifications of felonies to ten classifications of non-drug felonies and four classifications of drug felonies and created presumptive sentences, some based upon the number of months. We did leave border boxes which were basically a judge's free call on the tough issues. People who either have serious crimes and not that much record or who had less serious crimes, but had more lengthy criminal history. But it's driven by criminal history and severity of the offense, no question about that. Then there are the departure factors. And Kansas created kind of a legally anomalous standard of substantial and compelling reasons for departure, either from non-prison to imprisonment or backwards, for going above or below the particular box based upon criminal history and severity of the offense. Those obviously became an issue where a great deal of litigation triggered a list of statutorily approved factors. But it was a non-exclusive list; quite a body of case law came about over that. Prison population stabilized. The Kansas Legislature in effect used that as a device to understand management of the system. In fact, the database that Barb Tombs created was something that created a tremendous reservoir of legislative goodwill for the guidelines and for the whole sentencing process in Kansas. And because of that kind of thing, when the commission would make decisions and move in policy directions to respond to the legislature, we had a high degree of credibility. Okay. Along comes the situation of the *Apprendi* case and all of a sudden we go into the situation with the *Gould* case, saying no, you can't go out. The Sentencing Commission didn't just sit back and say, "We'll let the legislature worry about this." They sat down and came up with what they felt were organized approaches to this. One option was to just take the highest possible number you could conceive of out there by the most serious box and say, "This is the peg we're going to hang our hat on." That had the elegance of simplicity, but what they did was say "No, that's wrong. We're going to go to a system such as we've created—the bifurcated system." And quite frankly, for a variety of reasons which I don't have time to touch on, it's been used very sparingly. The only experience I've had, for instance, has been on agreed-upon situations. Most of the departures pre-*Gould* and pre-*Apprendi*, were agreed upon. There were a number of contested ones, but it was used as a plea bargain device, quite frankly.

But still, it's not been a big process. Briefly, three reasons. Penalties for the most serious cases are already sky high in many cases. Second, it's very easy to

use consecutive sentencing in Kansas. And the third reason is that we tend to have a criminal code which facilitates subdividing crimes into multiple offenses: such as a drug case, which can be divided into manufacturing, possession of drug paraphernalia and necessary precursors, possession of an anhydrous ammonia in an unapproved container. Thinking about the manufacturing of methamphetamine and somebody in your family that's ever wanted to manufacture. I mean, it literally can be subdivided down in separate offenses and then used as consecutive sentencing. It's a tremendous plea bargain device. And so we can go into more detail later, but that's the hundred-mile-an-hour tour of Kansas.

J. Bradley O'Connell: I think the "sky is falling" framework is a good one for measuring different states. And in California, I would say it's much more than a blip. It's more on the scale of a heavy meteor shower, but nowhere near an asteroid. The irony in California is that I think we have a very high proportion of sentences affected by *Blakely*—probably a much greater proportion than in the federal system or in any other system that uses guidelines for upper departures. Yet, ironically, it doesn't have dire implications for the long-term basic structure of our sentencing. California is a non-guidelines determinate sentencing state. And its structure is a great deal simpler than I understand the Guidelines to be. We don't have points. We don't have a matrix. We don't have grids. A typical sentence consists of a base term plus enhancements. And our base terms are quite simple. They're triads: upper, middle, lower. The reason we're affected by *Blakely* is that it is a presumptive sentencing system. We have a statute that says a judge shall impose the middle term unless he finds aggravating or mitigating factors. And we have, in our rules of court, separate lists of aggravating and mitigating factors that can be applied to any crime, subject to the limitation that they have to be something over and above the offense. You cannot make a dual use of an element of the offense. So another important aspect is that our triads are quite narrow. Our triads tend to be something like two years, three years, four years, three, four, five, usually in that range. I can think of only a couple of offenses that have triads with very significant departures. Voluntary manslaughter: three, six, eleven. That's one of the biggest. A more traditional triad would be something like three, four, five. Among other things, that means upper terms are a lot more common than upward departures. Frank Bowman was saying that there were about one percent upward departures in the federal system. Sadly, there don't seem to be statistics on this in the California system, but my own impression is, maybe twenty to thirty percent of sentences are upper terms. So you have a huge number of cases affected. Why is it not all that important? It's because long ago, our enhancements overtook our base terms as comprising the bulk of the sentences in serious cases. We run the jurisdiction least affected by *Apprendi* because we've got loads of enhancements, which function identically as the one in *Apprendi*, which is that they are a separate penalty that sits on top of the base term. But we already had statutory rights to a trial on those enhancements. I would occasionally give my little spiels to trial attorney groups on how to preserve the

record and things. And I'd be talking about recent Supreme Court cases, I'd mention *Apprendi*, and no one would have heard of it. It didn't affect practice at the trial level. And it affected us a lot at the appellate level just because we got to take advantage of a *Chapman*³¹ standard, but for a trial practice, it didn't change things much at all. The enhancements are what comprised most of one's sentence in California. In fact, California, like so many states, has seen a huge increase in sentences in the roughly twenty-five years since determinate sentencing was instituted. Yet, there's been very little change in the base terms. The difference is that maybe in 1977, a robber who used a gun and caused serious bodily injury maybe would end up with a sentence of nine or ten years. Now, he might end up with a sentence on the order of thirty years to life. That's without any change in the base term, which is still, I think, something like three, four, five, but with a steady escalation of enhancements. So in the short immediate term, we are fighting all over the state over our upper terms. And we've got a couple in the Supreme Court. But what we're fighting over is one- or two-year sentence increments per case. So a larger percentage of cases are affected but a lesser per case quantum of the sentence is affected.

Steven Chanenson: For about twenty-five years, Pennsylvania has had presumptive sentencing guidelines. However, we are also an indeterminate state, which means we have parole release authority. As such, judges impose a minimum and a maximum sentence—for example, a term of two to four years. For state (as opposed to county) sentences, the defendant cannot be released before the expiration of the judicially imposed minimum sentence. The Pennsylvania Guidelines only apply to the minimum sentence. When the judge imposes this minimum sentence, she must follow the Guidelines, which are flexible and allow for a healthy amount of judicial discretion with some appellate review. In contrast, the maximum sentence is left completely to the judge's discretion. The judge may impose a maximum sentence up to the traditional maximum sentence set by the General Assembly. Furthermore, our state courts have long called the maximum sentence the "true sentence," in part because that is the amount of time the defendant is under the control of the criminal justice system—either in prison or on parole subject to incarceration. For *Blakely* purposes, the fact that the Pennsylvania Guidelines allow judges unfettered discretion to impose the maximum sentence is critical. It is our view that we avoid any and all *Blakely* problems because the maximum or true sentence is still within the judge's complete discretion. Nevertheless, *Blakely* has provided an opportunity to focus the attention of the General Assembly on sentencing issues. Pennsylvania still has some *Apprendi* issues floating about—particularly in the area of three-strikes. I am optimistic that the General Assembly will be willing to resolve these issues in the near future.

³¹ *Chapman v. California*, 386 U.S. 18, 22 (1967) (stating constitutional errors at trial may be held harmless if the court finds harmlessness beyond a reasonable doubt).

Ronald Wright: North Carolina has a sort of standard presumptive grid. It looks a lot like Minnesota, maybe like Kansas. What's distinctive about North Carolina is its emphasis on controls of intermediate and community sentences as well as prison; so, there are some guidelines for which intermediate sentence you're going to impose. And that I think is completely unaffected by *Blakely*. There aren't any departures from the guidelines as such. Instead, the judges are told, "You can pick a sentence within the standard—the presumptive range, the mitigated range or the aggravated range." But those are the only possibilities. There is no further statutory range for departures, up or down from that. But on the other hand, those ranges are somewhat generous so that there's quite a bit of play for the judges within those three ranges. And if you look at the numbers of upward or of mitigating and aggravated sentence ranges, sentences that are imposed, the numbers look and sound an awful lot like the departure numbers from other states. So that functionally, these mitigated and aggravated ranges look like departures. How does *Blakely* affect this system? First of all, it's very clear and the North Carolina courts have been quick to rule on the merits on these things. They say that any sentence that moved up into the aggravated range is affected by *Blakely* because you have to make certain findings to justify an aggravated range sentence. That amounts to about seven percent of the cases for any given year. Last year it was 2,000 cases, about seven percent of the total sentences. There are also some smaller features of the system that could affect, in small ways, a lot of cases. Things like the prior similar record or prior similar offense that gets you an extra prior record point, similar to the Minnesota system. How has the state reacted to this? My impression, just as an outside observer, is that it's been a reaction of patience, that people think these are important cases and we can't live with this indefinitely, but for the moment, the prosecutors have put all of their aggravated range sentencing on hold. They said that we'll eventually get back to doing this, and when murder cases come around, we have to do it. And we will handle that like we have been recently handling firearm enhancements. So we'll do this, but we will bide our time and see how this goes. And the second reaction that I've noticed is that the commission is taking its lead on this, that they've moved along sort of deliberately, somewhat slowly, but everybody is saying, "Well, the Commission's going to think about this and in January or maybe February, they'll come back to the general assembly with some possible fixes that might be necessary for *Blakely*." So my impression is a reaction in the state that is patient.

In North Carolina, you could think of *Apprendi* as inoculating the system, and immunizing it from the later onslaught of the *Blakely* virus. *Apprendi* was an attenuated form of the virus. It was easier to deal with, because it didn't affect that many cases. So it comes along. In North Carolina, we had to figure out what to do with firearm enhancements. We used to be able to handle these without a jury trial, now we've got to have a jury trial. What do we do? Well, some prosecutor just makes up some language on the fly, tries it; it turns out you also have to make up the jury special interrogatory forms and a few jury instructions. They gave it all a try, and the defense attorneys all along the way are objecting, "Hey, wait a

minute. There's nothing in the statute that allows this. You can't do this if there's no statutory authorization." But they were not really fighting that hard on this question, because they were strategic enough to realize, "Maybe on the defense side, I don't want the legislature jumping into this too quickly. So maybe I'd rather they just stay out of it for a while, and I'll have to raise the argument but I won't push it too hard."

So, lo and behold, this not-very-carefully-thought-out procedural way through the maze survives scrutiny. The North Carolina Supreme Court, in *State v Lucas*,³² approves it. And you've got your antibody now. Now, you've figured out how you're going to survive the later onslaught of similar questions in *Blakely*, so that now that *Blakely* has arrived, all of the prosecutors that I've talked to, all the defense attorneys in the state that I've talked to are saying, "Well, how do we handle it? The same way we do firearm enhancements." Because why? Is it elegant? Does it further the values of *Blakely*? Well, no, it works. It has survived appellate review. There might be better ways to do it, more efficient ways, but this one works, and we can go with that. And an extra virtue for the defense is we don't have to be very explicit about going to the legislature and asking them to really think about what they want the world to look like now. So we can have a very low visibility, low impact, and very reliable fix that was created on the fly during the earlier set of issues.

This whole sequence of events shows something about the genius of the common law. We've got a smaller version of the case that comes along early, *Apprendi*, we get some preliminary efforts to solve all the procedural ins and outs, and somehow or another, we are now going to carry those forward and they will become entrenched and unthinkable to change in North Carolina just through the genius of the common law. Actually, for a lot of systems, those fixes that came into place without a lot of reflection are going to be especially true for the drafting of the indictments, the language that works in the indictments, and the special interrogatories. Where it's going to work less well is with jury instructions.

Marc Miller: I mean to pose now a question to Kevin Reitz about how generalizable the comments from these five states are to other states, given his long-standing interest in understanding the variety of state systems and sentencing reform. This is a much larger enterprise than just the federal enterprise, but one of the things we're hearing so far in all the stories, with the exception of California, is this interesting role of a commission and the interplay with the legislature and the kind of choices that the commission makes, but also the kind of trust and the patience of prosecutors in the role of a commission in a state like North Carolina. So Kevin, can we generalize about how disruptive, fundamentally disruptive, *Blakely* is? And to set up that question, I'd like to read a short question that was sent to me by Richard Frase, who was going to be here and be part of the panel and then got sick and was unable to fly out. But Richard, who also, along with Kevin,

³² 548 S.E.2d 712 (N.C. 2001).

is one of the handful of folks that systematically followed states, wrote, "I would argue that *Blakely* is harshest on the best state systems. Presumptive guidelines govern more than just the minimum sentence with reasonable recommended sentences and severity levels, thus justifying more than a token number of upward departures. *Blakely* may encourage good states to go bad and bad states to stay bad."

Kevin Reitz: It's treacherous to generalize. Different states have different dimensions of *Blakely* problems. Some are probably not affected at all on the systemic level. *Blakely* has said that the traditional indeterminate states remain constitutionally untroubled by the jury trial rule, even though we know the judges in those states engage in a lot of invisible fact-finding. The very breadth of their discretion seems to somehow insulate them from jury trial scrutiny. As many as one-half of the states have some sort of guideline or presumptive sentencing system. Across those states there is a range of uncertainty, even as a threshold matter, on whether *Blakely* applies to them. Ohio has quite a detailed set of statutory presumptions, which they call guidelines. So there is a fierce debate: does *Blakely* even apply at all in Ohio? I think it does, but many in Ohio think it doesn't. There are also states that have guidelines that are explicitly called "voluntary" guidelines, or the guidelines are treated as advisory by the courts. Yet in most of these jurisdictions, there is a statutory requirement for departures that judges must give a statement of the facts and circumstances that have persuaded the judge not to follow the recommended guideline sentence. It's at least possible that *Blakely* will attach to that sort of system.

Is the requirement that you make a factual statement the same thing as making a factual finding legally essential to punishment in the case? There are many potentially available responses. I tend to group these under two headings: approach and avoidance. It's possible to meet *Blakely* head on, as Kansas has done, and as Minnesota proposes to do, by taking the Supreme Court's holding seriously, that juries are required for certain kinds of fact-finding. For states that choose to provide juries in those circumstances, you're taking *Blakely* on its word. The avoidance strategies alter the fundamentals of sentencing systems so that *Blakely* passes them by. In Pennsylvania, for example, the conjunction of guidelines plus parole release gives rise to the argument that *Blakely* doesn't apply. Is that constitutionally airtight? No one knows for sure. There's discussion in some states that have presumptive guidelines, as in the federal system, to convert guidelines to voluntary advisory prescriptions, rather than prescriptions that have force of law. That would also be an avoidance technique.

Now, at the state level, this fundamental fork in the road, the choice between approach and avoidance, depends upon how policymakers weigh the prospective costs of either route. For most states there will be real costs imposed in either direction. The Kansas system, for example, does not function as well today as it did before it chose to meet the jury trial right head on. But yet, the landscape in Kansas would be far worse if Kansas had decided to dump its guideline systems

entirely and go back to indeterminacy or move to voluntary guidelines or replace guidelines with mandatory minimums. So Kansas faced the choice between the incremental cost of creating a jury procedure for fact-finding at sentencing and making broader systemic changes that would have undone much of what the state has labored hard to achieve over many years. In the better reform states where there is a real investment and a sense of accomplishment in what has occurred under sentencing reform, policymakers are more likely to approach, rather than avoid *Blakely*. These systems will probably lose something in judicial discretion, transparency, and perhaps even the reviewability of sentencing decisions. But the basic building blocks of structured sentencing, including the ability to predict and control prison growth and the use of prison resources over time, will be preserved. That basic function of guidelines, in many states, certainly in Kansas and Minnesota and North Carolina, is seen as central, and the procedural costs of meeting *Blakely* head on are probably lower than opening the state up to an uncontrolled system. States that feel they've made progress on those demands don't want to roll back the clock. But we do see in many states, even a state like Washington, a serious contemplation of major systemic change. Movement in the Washington system from a presumptive guideline system to a voluntary guideline system seems to be a real possibility. Alaska is seriously considering a top-down guideline system in *Blakely's* wake that would set presumptive sentences very high. And then you have to have legitimate mitigating factors to get down to what would ordinarily be an appropriate sentence.

There is at least a systemic cost in driving the mechanism for aggravated sentences to some of these other things. In Kansas, if you have a formal departure mechanism that asks the judge to put his or her reasoning on the record and then that's appealable, there's more visibility and there's reviewability in the process that gets you to the aggravated sentence. On the other hand, if that discretion in some number of cases is forced underground, in Kansas, the judge's discretion to impose a consecutive sentence is unconstrained, as it is in some other states, the decision whether or not to do it and the extent of the increase is unconstrained. So the decision to impose a consecutive sentence becomes invisible, and the judge doesn't have to make a statement of reasons. No one has the right to appeal that. We don't even know why. And to me, that is a loss of visibility and reviewability in some number of cases, that's unfortunate.

Barbara Tombs: When we're talking about the aggravated departures, there are a limited number, but in our state, even though they represent a small number, they're important. And our approach to addressing the ability to do aggravated departures was important because number one, we think when departures are granted, they're necessary. And the other issue is taken into consideration because if we do not allow those departures to occur, there will be the movement toward allocating the maximum sentences. Our argument has always been our ranges are very close. There's less than fifteen percent spread in numbers within a certain cellblock. And we've kept them like that and the sentences intact because they are

for the normal sentence, the ordinary sentence. For those extraordinary sentences, we allow the departures. If the departure factor wasn't addressed to respond to *Blakely*, then we see a movement to increase those grid cells to have a much larger range, maybe fifty percent to encompass those necessary higher sentences. Then we lose what was the underlying purpose of our guidelines. The other issue being that we have really good data. Being able to balance the underlying principle with that data so that we can say if we do this, "This is how," in many cases has been really good for us in trying to control some of the hysteria.

J. Bradley O'Connell: To a greater degree than *Apprendi*, *Blakely* will reveal the practical difficulties with the two biggest anomalies in the *Apprendi* line of cases, which are *Almendarez-Torres* and *Harris*. Let's just think of *Almendarez-Torres*. I'm thinking of what various people have said about their recidivist factors, custody points, and prior offenses. In California we have several recidivist factors, factors which are being urged, common with *Almendarez-Torres*, that go well beyond the bare fact of prior conviction. Poor performance on probation or parole, which frequently, in our court experience, in the probation report says, "I called up his parole officer, and he said that there haven't been many parole revocations. This guy's a disaster on parole. He's always using drugs, he's always getting arrested for stealing." Under a broad view of *Almendarez-Torres*, well, his parole is just part of his sentence on a prior case, which is a recidivist factor, so you don't need to worry about that because that doesn't implicate jury rights. Although that is a classic example of something depending on findings of historical fact, which have never been adjudicated at all, much less adjudicated in a prior proceeding in which the defendant had a right to a jury and truth beyond a reasonable doubt. So the sorts of factors that are affected by *Blakely* are less clean than those affected initially by *Apprendi*, in terms of the current offense versus prior conviction dichotomy.

A solution that says we're going to give you the constitutional rights required by *Blakely*, but no more, would create anomalies because you would have some aggravators found by juries, some aggravators found by judges, and all mitigators found by judges, even though aggravators and mitigators were drafted with the expectation that the same decisionmaker would be making all findings and then balancing the factors.

Michael Dreeben. Before *Blakely* was argued, I called up and talked to several Kansas prosecutors in the anticipation that if the court actually asked, "Well, how's this working out in Kansas?" I would have some anecdotal information that I carefully called on to support my thesis that I had gotten the straight story from Kansas. And what I got from Kansas prosecutors is that *State v. Gould* and the statutory revision that followed it had killed off upward departures because it had raised an unbelievable hairball of procedural issues. And the one that I remember the most is that nobody can figure out how to voir dire a jury in a bifurcated sentencing hearing in a way that wouldn't cause problems. Because if you're

going to voir dire the jury on an aggravated factor like the death penalty, it's problematic for defense counsel to have to do the voir dire on a potential aggravating factor that the jury might never have to hear if they find the defendant not guilty. And the state didn't like it either because it created numerous potential appellate issues. And that was just one example. So I believe I talked to the prosecutor in the busiest district in Kansas. He said we just basically quit it altogether, and that the Kansas legislature was not unhappy about this because they were tired of paying for longer sentences anyway. So there was no adverse feedback from the prosecutors dropping it. But the point I wanted to follow up here is when I heard Judge Walker describing the Kansas system, it sounded as though the upward departures were still valid as a plea bargaining device. And the consequence it sounded to me was that prosecutors and defense counsel are able to charge bargain in a way that will dictate the sentence. And if the underlying original premise of a guideline system like the federal system is to avoid unwarranted disparities that are caused by differential exercises of judicial discretion, is it the case in Kansas that Kansas is not worried about that problem and is comfortable, or is only worried about that problem and it's not worried about prosecutors, or is unwarranted disparity not really a factor at all in the Kansas system?

Richard Walker: Even before the *Gould* decision, when we were running statewide about ten or fifteen percent of cases having departures, the vast majority of them were already agreed to. Now, judges aren't bound by that and I always tell the defendant, "Do you understand that you're not bound by the plea negotiations? I can sentence you up to the fullest extent of the law, regardless of negotiations." But as a practical matter, you don't want to start rejecting those on a routine basis or you're going to be trying jury trials all over the place. So I can't say it hasn't had an effect, although it's very difficult to quantify because that kind of charge bargaining—bargaining to a box on the grid—was going on well before any of these *Apprendi* or *Blakely* cases came along. There's always been that sort of thing since judges have always used their discretion to accept or reject pleas, so I don't see that as a big watershed.

J. Bradley O'Connell: Well, let's take the example of a victim who is severely injured, possibly involving disfigurement. We have for a long time had a set of great bodily injury enhancements. And those enhancements, with jury instructions, have the same degree of definition as the elements of an offense. In fact, our definition of great bodily injury, which is an enhancement you could apply on any crime, maybe an assault, maybe a robbery, parallels the definition we use for certain other crimes such as felony battery, in which serious bodily injury is the element of the offense. So those are routinely tried to juries as part of the trial in chief. And they are submitted as a separate verdict form. Other examples: the less common ones are age of victim, drug quantity, anything that is an integral part of the current offense currently is just tried to a jury. Now, we do have bifurcation.

To date, that is only being used for prior convictions enhancements. And the most common, that sometimes takes the form of having been the prior conviction trial, occur immediately after the jury renders its verdict on the case-in-chief. As to the prior convictions, it's common to bifurcate and then ultimately waive a jury on the priors. We do now have down the road some possibly more difficult bifurcation issues because there certainly could be situations of trauma to the victim and the victim's family or things of that sort that come within one of our aggravators that would, from a defense perspective, be disastrous to be tried as part of the case-in-chief. And there's at least some discussion about the prospect of trying to bifurcate factors like those. But we haven't reached that point. There are things that are part of the immediate case-in-chief, including, for example, gang enhancements. Gang enhancements in California are more complex than your average offense because they require one to prove the characteristics of the gang and to prove that the gang committed a number of other offenses. So it's a mini-trial over this entity, which is frequently not one of your marquee gangs like the Crips or the Bloods, but rather it's the Stanford Alley Boys or something. And you have to have a little mini-trial. Now, there have been attempts to bifurcate those, which have largely gone nowhere. So, those typically, prejudicial though they are, get tried in the case-in-chief and are subject to a separate verdict with instructions about how many other crimes have been committed that define doing the current crime, in furtherance of the purposes of the gang. So those are part of the trial-in-chief.

Douglas Berman: Ohio went to sentencing reform exclusively for economic-control reasons. We don't really care about disparity concerns that much. What we care about is it's costing too much and all the non-violents are going away and all the violent are getting out and the bed spaces are disorganized. And so Ohio had a very systematic effort to control sanctions. And in addition, and to its great credit, Ohio focused on non-incarcerative policy and regulation; it's a dispositional issue and it isn't *Blakely*-ized. Ohio spent a lot of time focusing all of its guideline reform on non-incarcerative presumptions. And then there are all these findings you have to make in order to incarcerate. And so that's one of many issues. How that plays out in Ohio will be interesting to watch. In addition, they intentionally said, "We're not going to do a grid. We think grids are part of the problem. We're just going to have statutory ranges." That's all there is. And then there's an enormous amount of regulation about where in the range you need to be. Specifically, there's a presumption. But there's a presumption that you get the minimum term in the range. So in addition to it depending on what felony you have, there's a presumption that if it's not incarcerative, you have to make findings to put the person in jail. Yet the presumption in other felony settings is that you have to have the minimum of the range, so if it's three to five years, it is a fairly narrow range. You have to give the minimum unless you make certain findings. And this is part of what's driven the fact/law distinction in my mind. Here is an example of one of the findings that will allow a judge in Ohio to go above the

minimum statutory range for an offense: a finding that the shortest prison term will “demean the seriousness of the offender’s conduct or will not adequately protect the public.” How do you make that a jury issue? It’s certainly not a question of historical fact. And even more broadly, it’s the kind of thing that is uniquely for a judge to know about—for the special competency of a judge. You may think different judges will make different disparate judgments about that, but it’s amazing how functionally Ohio’s law is written. You read that and you think, “Of course. That makes sense,” to do the minimum term, unless the shortest prison term will “demean the seriousness of the offender’s conduct.” There’s a nice little retributivism for those theorists out there. And “will not adequately protect the public”—there’s a little consequentialism thrown in, either/or. But still, it’s fascinating to imagine that that’s a jury decision. Interestingly, the defense bar says, “Of course it’s a jury decision. Right, you know? Indisputably.”

Kevin Reitz: The Ohio appellate courts have done something that a lot of the appellate courts at the state level haven’t done under their system. And that is, they have taken an active interest in reviewing sentences within the guidelines of the statutory ranges for substantive proportionality. This isn’t a constitutional concept. It’s a power that’s given to them by statute so I call this a sort of sub-constitutional proportionality review. I think it’s a good idea. I’ve adopted that and been pushing it into the Model Penal Code. It’s not clear to me that sub-constitutional proportionality analysis is constitutional anymore, after *Blakely*. If an appellate court says, “Well, I’m going to look at the sentence that the trial judge imposed and I’m going to compare that against the factual record, leading to that sentence, and I find that the factual record was not adequate to support the sentence given,” what the appellate court, in essence, is saying is, “Well, trial judge, you need to define some more facts that are needed to be additional factors of some kind. In an armed robbery case, if you don’t show me the injury or the victim, you can’t get up to the maximum sentence.” An appellate court that goes down that route is creating a fact-finding requirement or a fact-finding threshold, at least in theory. If an appellate court does that and it becomes a legal requirement in the state, is that any different than a sentencing commission creating presumptions or fact-finding requirements in order to support sentences at certain levels? One of the doctrinal uncertainties about *Blakely* is whether appellate review includes the adequacy of the factual record. It seems to violate *Blakely* in all sorts of different ways.

Ronald Allen: Two points about rationality and then just one interesting historical comment. I want to generalize, Kevin Reitz, about what you said in response to Doug Berman. You raised the issue of questions of law versus questions of fact a couple of times. That may be a useful tool here, but when you’re talking about questions of law and you talk about demeaning something, I take it what you mean is you would decide that with propositions that have truth value. It’s true or false that something is demeaning or not demeaning. But what that means is what we

label a question of law is a question of fact. So underlying all these issues are facts. Now, you might sort out facts in other ways, but you're not going to get any purchase on this by the question of the law/fact distinction. Second, I'm hearing that one response to *Blakely* is pressure to move systems away from reasons towards discretionary sentence, parole, and consecutive sentences where it's unarticulated. That's an unintended consequence here. The third is a historical point. There's a disagreement as to the effect of *Blakely* on the states. Most of the people actually working in individual states seem to think this is not that big of a problem, whereas Kevin who's worked with many states indicates maybe it's a larger problem. But in any event, there's a very interesting inversion of the normal problem of constitutionalizing aspects of criminal procedure. The normal problem of constitutionalizing aspects of criminal procedure is you take provisions that are supposed to be applied to the federal government that worked in a certain sort of way, and apply them to the states, which have much different problems. And they become unworkable at the state level. Whereas what I'm hearing here is kind of the inverse of that—that this problem may not be such a big problem for the states, but a much larger problem for the federal government. For what it's worth, during the procedural revolution of the late '50s to the early '60s, this issue of the practicality of applying Bill of Rights provisions to the states was a really big ticket item. It led to the watering down of jury trial rights; somebody mentioned the six-month limit yesterday, but that's not the only one about the size of a jury. The point is those were driven by concerns about the effect of this on the states.

IDEALISTIC REFLECTIONS: THE FUTURE OF SENTENCING REFORM

Although the Supreme Court has tossed the world of prosecutors and criminal defense attorneys into near chaos, sentencing reform activists have viewed the Court's decisions as an opportunity to reform a system they have seen as badly flawed since its inception twenty years ago. Some critics of rigid guidelines argue, for instance, that racial disparities endemic in previous indeterminate sentencing regimes have merely become rules memorialized in sentencing guidelines themselves, and that strict guidelines are unduly harsh and contribute to the country's skyrocketing prison population. From the other side, some point to the high percentage of federal guideline minimum sentences handed out and to the rate of downward departures as evidence that the judges still cannot be trusted with sentencing. These critics would seek further legislation to narrow the choices of judges and "toughen" sentences even more. The new Sixth Amendment doctrine will surely lead to significant changes in the way we sentence defendants. Will it lead to changes in the character of sentences themselves? Will or should policymakers now take another look at mandatory minimums? What organization or body would be best suited for such an examination? What areas of the current sentencing system are most flawed and need the most change? Can we expect or should we encourage legislatures to examine the varied sentencing schemes adopted by different states? Might we be better off after all with non-mandatory

guidelines? Or is it quixotic to think that non-mandatory guidelines can solve the problems at which more rigid guidelines were aimed?

David Yellen: The whole sentencing reform movement was, in large part, the result of some very idealistic and forward-looking thinking by some fairly visionary academics and others. And it's important to keep in context the time frame involved. Those of us who are deeply involved in the nitty-gritty at one moment can't see, necessarily, when things are going to change in a fairly significant way. To wit: How many of us anticipated *Blakely*? So, how many other changes are coming down the road that we don't know about? Given we now have almost twenty-five years of experience with sentencing guidelines, there is, I think, a pretty broad consensus about what works well and what doesn't work so well. There are a lot more questions about how to get systems improved. But that's our goal.

Kevin Reitz: At the state level, the successful innovations in sentencing guideline reform have been among the few bright spots in American criminal justice history in the last thirty years. The Model Penal Code proposals have been going in the direction of a sentencing commission/sentencing guidelines/appellate review system not so different from that in Washington State, Minnesota, North Carolina, and Pennsylvania. There are a number of states that have had great success, certainly, compared to other sentencing systems in America with those experiments. Post-*Blakely*, the calculus potentially changes. But the recommendations that one would make to a state considering sentencing reform, I think, are quite similar to the recommendations that one would make to a state that has adopted a series of sentencing reforms and now must respond to *Blakely*. And I think the answer to that question is, probably, approach not avoidance. If the basic structure of sentencing presumptions and guidelines and a permanent commission and appellate review have given you results that you value, the incremental cost of accommodating to *Blakely* will be real but manageable. But they will be incremental and much smaller than moving away from an overall model that gives the state benefits that the state wants to preserve or should want to preserve.

In any jurisdiction considering a big change, a moment of constitutional uncertainty, as with the *Blakely* decision, affects the political dynamics of whether you can make a change. The *Blakely* court has made it clear that in determinate sentencing systems, where discretion is exercised, but we don't see it, it's not reviewable. It isn't regulated and remains constitutionally unproblematic, at least, under the *Apprendi/Blakely* line of cases. States like Massachusetts and other states that still have that form of structure are going to be tempted to some greater extent to say, "Well, the path of least resistance is to stay with what we have. Why bring on all these questions and uncertainties if we don't need to?" It adds to the problem of realizing systemic change. The importance of a Model Penal Code project may increase rather than decrease, if I'm right that *Blakely* creates a

perverse set of legislative incentives towards greater reliance on indeterminacy and mandatory minimum sentencing enhancements. The states will require information to dissuade them from taking those paths. Model legislation can help make that case.

Frank Bowman: I think it's true that the atmospherics regarding the sentence severity, the general public perception of appropriate sentence levels, but perhaps particularly with respect to drug crimes, may have changed, in an evolutionary sort of way. Perhaps, the public may be fractionally less inclined to throw the book at everybody and, particularly, anybody who's labeled as being a drug offender. I think there's some truth to that, perhaps because I, myself, am mellowing with age and it's not my job anymore to put people in prison for long periods of time for drug offenses. But I also think that in the relevant group of decision-makers in the federal system, to wit Congress, the normal reaction in most of us, and myself included, has been, "Oh, my God. Think of what those yahoos will do." And I think there's a good deal of truth to that as well. I think the instincts of this relatively small group of people who stand at the intersections and hold the levers of decisional power in Congress, and particularly, in the Republican House and also a relatively small group of people who stand at the critical junctions in the Department of Justice decision-making—those are the ones who stand in the way of at least incremental improvement in the possibilities for meaningful reform. I think that personnel changes in a relatively few positions in Washington could change the dynamic tremendously. And by that, I think enough has changed in the mood of the country and the mood of the population that if you change a relatively few people, then it's possible that you get somewhere. How far you get, I don't know. But I think you could. I think that the underlying societal dynamic has changed enough that if you move a few folks, you've got a chance.

Judge Charles Breyer: Well, of course, I believe that the role of a sentencing judge is to be the sentencer. That he or she is the one person in this system that purportedly is not an advocate and that is there to try to apply the basic goal of sentencing, which is that it achieves a fair result. But the question, "Where do we go from here?" reminds me of the lobster in the fish tank in a restaurant. You know, that's a good question. But you're not quite certain. I mean, you, sort of, know where you're going to go from there, right? And we all, sort of, are very nervous about where we're going to go from here. If you were to ask the question, "Where would I *like* to go from here?" I would like to go as follows: I would like the Sentencing Guidelines to be advisory. I would like judges to view the guideline range as presumptively reasonable. I would like judges to be able to give reasons why they don't follow the range that is set forth in writing; their reasons for any particular deviation from the range. That reason would be subject to appellate review. I would like to have, in sentencing issues, the standard of beyond a reasonable doubt. I see no reason not to have the standard of beyond a reasonable doubt. Judges are comfortable applying it. It's far clearer than the

probability or preponderance test. And so I would like to have that. I would like to get rid of the idea that you could possibly use acquitted conduct. Even though, of course, it's a Supreme Court case that tells us that we could, we must, actually apply it if we find by a preponderance of evidence of that conduct exists. But if you go over to the other standard, you're not going to be so troubled, I think, by that Supreme Court case. I would like to make sure that notice is given prior to the entry of plea, as to what the prosecutor believes the range of sentencing to be and the factors to be included in it. In the event that the prosecutor comes—and be limited to it, except in the case where he has newly discovered evidence. And if he can demonstrate that—he or she—that there's newly discovered evidence, then, I think the answer is to allow the defendant to withdraw the plea. Now, that's not perfect. We all know that's not perfect. But it's not so imperfect that it can't be achieved as a result. So that is where I would like to be.

At the argument at *Blakely*, the Chief Justice said, "Why don't we take every crime," and I'm not sure he was advocating this, "Why don't we take every crime, every federal crime and say, 'The punishment for every single federal crime is not less than one year or more than life?'" He said, "Doesn't that take care of the *Blakely* problem?" The answer was yes, it probably did take care of it. Justice Kennedy said, "What about the system in state court, such as the old California system, where the judge got up and he says, 'I hereby sentence you to the term prescribed by law.'" In California, the sentence for assault with a deadly weapon, I think was a year or something like that to twenty years or thirty years or something. And it would be the Parole Commission, the Board of Prison Terms and so forth that would set it. And he said, "That's what you used to have." Of course, he had no reasons and blah, blah, blah. That's what you used to have. Under the states, would that be okay? And he said, "Yeah, that would be okay, under *Blakely*." So what I'm suggesting is, it does take care of, I think, the *Blakely* problem. It may introduce some other problems, which would be interesting to talk about.

Albert Alschuler: Well, who's against it? And I mean, would the federal judges support it? Could we say that the informed academic community, overwhelmingly, supports it? Might if we had a different Justice Department? Might it be saleable in the Justice Department? Would there be some members of Congress who would support it? Is it not politically feasible? Who wants to talk about it?

Frank Bowman: I can respond to that. I think, no Justice Department under any predictable, or even likely administration that I can think of, would ever be in favor of Judge Breyer's advisory approach, if what they can have, by contrast, is anything like the system they've got. I myself would be in favor of this. As a matter of fact, I said so to the Senate. If it were my choice, I would be in favor of advisory guidelines. I think it would be, among other things, a tremendously interesting natural experiment. Even if it wasn't a permanent solution, I'd be all in

favor of it. But I don't think any line prosecutor's going to want that, at least relative to what she has now.

David Yellen: I think there is a substantial number of people here and elsewhere who wouldn't like that nearly as much as a guideline system that was more structured than advisory guidelines, but with a great deal more flexibility than the current Federal Guidelines.

Judge Charles Breyer: Well, I mean, I think the standard is one of reasonableness. The sentencing statute says you must impose a sentence, or you must impose a sentence that's reasonable to ensure an adequate punishment and so forth and so on. So I think what you would end up, and this is what my brother was saying in the argument. He was saying, "Will you have your Courts of Appeals looking at anything out of the range, out of 'The Heartland'?" Right? Out of the range. And then looking at the reasons; and then deciding, is that a reason? Is that reasonable, under the circumstances, to apply the guidelines or to apply the sentencing factors that particular way?

Joseph Kennedy: The last question. This is an academic question. When I was listening to you earlier, I got the sense that you were, sort of, a Marvin Frankel disciple. So then, I was surprised when I heard you say you'd be okay with advisory guidelines. So my question to you is, if you could've had this system back, originally, at the time that Frankel made his proposal, would you have supported it then? Or are your concerns about disparity not as great now, because we've had a couple of decades of guideline sentencing, and that you, sort of, think the culture of judging has changed in a way that makes a disparity problem less serious?

Judge Charles Breyer: I am concerned about disparities occurring without principled reasons, subject to review for the disparities. And that's my concern. Let me tell you, I started out as a D.A. And as a D.A., the one part of the job I really hated was sitting down with the defense lawyer and starting to argue about how many months. And they're, you know, just four months, eight months, twelve months. I felt like I was, sort of, in a bazaar. And I thought that I didn't know what I was talking about, because my idea of four months is different from somebody else's idea of four months; not well suited for that. So I don't want to go back to that system, where every judge simply puts on paper whatever they think is a reasonable sentence under the circumstances; unless you have to give your reasons for it, and then somebody looks at your reasons and makes a determination whether those are good reasons from an appellate point of view.

Albert Alschuler: What's clear is the states and every state, that I'm aware of is much less concerned with the kinds of disparities that result from a moderate amount of judicial discretion or plea bargaining practices that we heard about.

Why do you think the states have been so much more accepting of moderate sentencing variations than at the federal level, where, as I said yesterday, it's become, I think, sort of a talismanic thing. You know, "Repeal the twenty-five percent rule? Oh, my gosh! Unwarranted disparity will go through the roof!"

Kevin Reitz: You're right that the sense of necessity to impose a rigorous conception of uniformity on sentences in state systems just doesn't exist. At the state level, there's always been a recognition (and maybe in some of the federal legislative history there was this philosophy lurking) that no code or sentencing commission can, in advance, predict all the factual considerations that judges should be allowed to consider in individual cases. No one is smart enough, in advance, to do that. The philosophy of uniformity was different in the states than in the federal system. There was more of a sense that uniformity means we give judges a starting point, and we'll ask judges to engage in a uniform thought process that is visible and reviewable when moving away from that starting point. Departures are not by definition suspect. Most state systems accept that it's a good thing when judges depart in appropriate cases.

Robert Weisberg: This is a sort of a *realpolitik* question about political feasibility. If we're concerned about crude politics, I'm not sure the issue is disparity; the issue is going to be perceptions of severity. And so it's a question of how that translates into the baser political instincts. Now before *Blakely* I, and no doubt others as well, had started to observe some interesting things happening to mandatory minimum drug sentences in the states—basically, the potential repeal or actual repeal in some states, of the Rockefeller-era drug laws. Why? Well, gee, the states may have even suffered a kind of residual guilty conscience, but to some extent, it has been a budgetary issue. Another factor is that these repeal efforts are significantly led by, Republicans or Conservatives; it's a case of "Nixon goes to China." Then why are we so worried about Congress? First, is it that the federal system isn't even susceptible to the kind of budgetary constraints, in terms of the relative significance of prison budgets in the federal system, as compared to the state system? Is it that there is simply a strange skewed hyper-incentive for political demagoguery in the federal system because of something that people don't realize very much: the federal criminal system doesn't involve that many criminals but federal legislatures are the most visible legislatures, so they are the most recklessly indifferent to what they do. It is possible though, that if a Judge Breyer proposal were framed, and if there's anything to pick up from the spirit of what's going on in the states and if you also combine it with the fact that crime is supposed to be down (another factor, which, presumably, has affected the states), are we too pessimistic about what would happen in Congress? Last twist on this: Is it that I've got the wrong constituency here? It's not the voters, it's the prosecutors. In other words, what Congress is going to be responding to is not the severity concern in the raw sense, but a kind of power concern, so that the real constituency is the Department of Justice, as it exists at any point.

Douglas Berman: Rules aren't bad. The safety valve is a rule, and a very, very good rule, that was passed by Congress that defined a set of circumstances in which a drug offender ought not get a mandatory minimum sentence. And I don't think anybody would say that the rule should have been, "Judge, whenever you think it's not really a bad drug offender, then you can go below the mandatory." Now, of course, the irony is prosecutors get that rule; it's called 5K1.1. And they don't have to articulate why. They get to decide, in a variety of ways, whether it's by charging or through 5K motions, not to have to articulate. Now, they have a lot of internal rules, and I'm sure they use their power as properly as a Department of Justice should, but they're not on the record. They're not subject to rules that have all the requirements that we care about. And again, that's why I get to the perspective: It's not rules; it's the kinds of rules that we *have*. And imagine another rule that we could've had built into the system that, maybe, is where we should start. How about that the Sentencing Commission has to turn into a downward adjustment any factor that more than a thousand federal judges say ought to be considered at sentencing. So that would mean, you go through the downward departure statistics, and you say, "Hey, a thousand judges have downwardly departed for extraordinary family circumstances. We, the Sentencing Commission, have an obligation to reflect that wisdom and knowledge that maybe this ought to be considered." And in fact, I think the problem with the extraordinary family circumstances is that there is no rule. The judges in the Second Circuit and the Ninth Circuit get to do what they want and get to figure out a way to call it the right thing, and they get to do a departure; and the judges in the Sixth Circuit and the Fourth Circuit don't get a chance to do that! And if we really cared about disparity, the Sentencing Commission would be cleaning that up, but doing it not by, as they did with youthful guidance and all of that, saying, no rule, no departure. They codify it in a sensible way. The last point is Michael Tonry's point, which is a great one. He would say, "Keep in mind how much all of this is a function of our desire to quantify." What can be easily quantified? Imprisonment levels, drug quantities, amounts of loss, that's what our system's driven by. It's hard to quantify extraordinary family circumstances. It's hard to quantify aberrant behavior. It's hard to quantify community service.

Michael Dreeben: Many people have observed that the Sentencing Guidelines emerged as a surrogate Federal Criminal Code, layered right on top of the defective structure in Title 18, which was never reformed because Congress could never muster the political will to do it. There were too many committees that blocked action on it, and with all the different constituencies fighting over it, it became a politically untenable project. Yet Judge Breyer's proposal would require the Congress to do far more. It requires Congress to properly graduate various crimes *and* punishments. Given that Congress failed, given a decade to do a similar project before, what should we think about the actual prospects for enlightened reform, in a short period of time in a panicked environment after *Booker* and *Fanfan*?

Susan Klein: I don't think voluntary guidelines are going to work. It might depend on who drafts them. If we keep the guidelines we have now and just make them voluntary, then that's not going to work in my opinion. Because over time, judges will just do whatever they want. Once they get in office, they realize they don't really have to follow the guidelines; they can't be fired. Your answer of giving some kind of appeal, I don't think that's going to work because, either, it's going to be meaningless, right? There's always a reason why I departed from the guidelines: "I didn't like it. I thought it was too high." Or if you really put bite into the appeal and you say, "You have to have a reason that follows all the policy judgments of the guidelines," then you have a *Blakely* problem, all right? Because if the guidelines were drafted by Congress, and you get reversed on an appeal for not following them, that's *Blakely*. You know, maybe you could have voluntary guidelines that were created by judges and not created by Congress. Well, if you did that and then had an appeal and you formed a common law sentencing, would that be subject to *Blakely*?

Kate Stith: I am not sanguine about code reform. Reform of the federal code foundered on seven provisions on which the labor unions and ACLU were opposed to various other people, and nobody was giving in. And it was a Model Penal Code kind of thing. It was going to be these very general—and it was brilliant of Senator Kennedy and other people to say, "Maybe we can bypass this whole thing by addressing the back end." It just didn't work out well. And so I'm not sure, we don't have any examples of code reform, except for the Model Penal Code. So I just think that's a huge project. I think there's another actor here that we've only talked about in derisive terms, and that's the Department of Justice. It does seem to me that is actually the big elephant on the institutional level. And leadership from the Attorney General and his or her people, and ultimately, that means presidential leadership. But I think the Department of Justice is obviously the first step, and the White House stays out of it. And I do think that, with some changes there, there might be some reforms that are possible. And I have always considered myself part of the Department of Justice. I would love to see them take the lead.

Marc Miller: What might academics, what might people interested in policy reform do? They might write a book. But before you say, "There goes an academic, again," I'm thinking of a book much of the type that combines the principals of a Frankel and the policy focus of the "Toward a Just Effective Sentencing System." What might that book look like? It might be titled, "A More Perfect System." Not absolutely perfect, but a more perfect system. "Sentencing Reform After 25 Years of Structured or Guideline Reforms" or "Lessons from the States," if you wanted to be that explicit and focus on the states and, I think, the greater intelligence that comes out of them. Introduction, "Constitutional Moment." We could use that kind of language. But I think this is a policy moment. I think dramatic changes in policy happen at times of great disruption,

whatever the source. It can be a dramatic case. It can be something in a legislature. It can be a case, and for me, that's why I'm intrigued and fascinated, and I learn a lot by your brilliant exposition of *Blakely* and how we got there and the problems. But it concerns me less in the enterprise I'm now discussing. What would you do? You'd talk about the experiments and lessons from twenty-five years, celebrate the states up front, celebrate the Sentencing Reform Act, praise Congress for its original principals and wisdom, with whatever qualifications are needed. The goal would be to get some very direct, short, readable, clear, reasonably, widely-supported set of principles that could help to shape the debate.

What would the sections look like? Part One, "Reasonable Consistency: Avoiding Unwarranted Disparity." There's an opportunity to inform and define the notion of disparity. You talk about warranted and unwarranted disparity, uniformity and disparity. Mandatory penalties would have to be up front, part of this discussion, I think.

Part Two, "Fair Process." What are the fair process principles? You could call them Due Process, but that clouds it. Fair process principles. "A," notice. Can I agree? Up front, critical. In my other life, as an environmental natural resources scholar, habitat conservation plans. No surprises under the Endangered Species Act. A goal to articulate so people can make reasoned judgments, whether it's building a hotel or heading off to prison. "B," predictability. You've got to have reasonable predictability; it's not enough to say you have notice that it can be anything from zero to twenty. "C," a set of sentencing processes where they include reasons, whether juries are making judgments, or judges are, or if you have plea processes, which go to the fourth principle: transparency. It would be very interesting to raise the issues of prosecutors and plea-bargaining. What about transparency on screening or declinations or choices? What kind of information should be revealed? Maybe, you don't touch that here. But it's important over time.

Part Three, "Articulated Purposes." Here, I think you talk about the purposes of punishment or justifications. Congress did. They set up the courts and the Commission to do it. And the Commission, with all due respect, didn't. Let's leave it there. "Purposes of the System." You articulate the principals or reform. What are the goals? Again, in relatively general terms, I think you have to confront this issue of code reform and subset of criminal law. Not so much, necessarily, as a product of *Blakely*. Although, maybe, as a product of *Blakely*. But because, logically and inevitably, Ron Allen, you and others have made this sort of point, whereas you have to think about the relationship. Otherwise, there's this back door and you don't end up confronting the deeper substantive realities. I think you have to raise the problem of what is the relationship between sentencing and the problem of crime. You have to, at least, put on the table the possibility that lawyers, criminal justice systems and sentencing are not the only—and you might even, if you're being even more honest, say the primary response to the social issue of crime.

Four, "Assessment, Knowledge and Adaptation." I think Congress got it right in the SRA when it made it a knowledge-based system. It said not that knowledge tells you perfectly what the sentences are (there are value choices, et cetera) but that sentencing the wide number of cases, the many actors involved and the deep social principals require certain information. I don't think we've carried that out particularly well; though the Federal Commission and many state commissions have done many good things here, it could be done better. You could talk about a data panel that required certain kinds of data to be provided, reports, sentencing information systems. You talked about complexity, and I sure hope we talk about humility and punishment at some point.

Section Five, "Institutional Variation." Talk about the rights and responsibilities, not the constitutional constraints. But logically, the rights and responsibilities of legislatures, commissions, sentencing judges, where you'd get to talk about whether you have to have departures in a system to be fair or not. Appellate judges, parole and review; I think parole and review have to come back on the table as part of the systems that might work. You cannot ignore prosecutors.

Part Six, "Our Federal System." It would have three parts. States as Leaders: You say it up front, you say it during the discussions and you say it, again. "B," leave the states alone as best you can. "C," criminal justice is overwhelmingly a state matter; that is still true in the numbers, even as Congress creates overlapping offenses and federalizes, and it should be stated as part of a general principal that's put in front of Congress. Now, how might this be done? Well, first, you'd want a very good press. You'd want to know that it's going to get in the hands of every member of Congress, in the hands of state commissions, in the hands of reformers.

